UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PSQ, INC.

Employer

and Case 04-RC-112179

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 743

Petitioner

DECISION AND DIRECTION

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge and an objection to a mail ballot election held between November 6 and November 21, 2013, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows one for and one against the Petitioner, with one challenged ballot, a number sufficient to affect the results.

The Board has reviewed the record in light of the exceptions¹ and briefs and has adopted the hearing officer's findings² and recommendations,³ as modified below.

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In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the challenge to the ballot of employee Jayson Weir.

The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

At one point in his report, the hearing officer inadvertently stated that the Employer engaged in objectionable conduct. In fact, the Petitioner engaged in objectionable conduct.

The hearing officer recommended overruling the challenge to the ballot and sustaining the Employer's Objection. However, he recommended opening and counting the challenged ballot only if the Board disagreed with his recommendation to sustain the Employer's Objection. If the Board agreed with the latter recommendation, he recommended that the election be set aside and a new election be conducted.

Contrary to the hearing officer, the proper procedure is to open and count the challenged ballot and then determine whether the election should be set aside and a new election conducted. See, e.g., *Skyline Builders, Inc.*, 340 NLRB 109, 110 (2003); *Hospital del Maestro*, 323 NLRB 93, 95 (1997); *Pine Shores, Inc.*, 321 NLRB 1437, 1437 (1996). "In these circumstances, to direct a second election, regardless of the outcome of the election tally, would in effect benefit the wrongdoer[]" *Pine Shores*, above at 1437. Accordingly, consistent with Board precedent, we shall direct that the challenged ballot be opened and counted. If the Petitioner prevails in the revised tally, the Regional Director shall conduct a second election. If the

We agree with the hearing officer's recommendation to sustain the Employer's Objection. The Petitioner's grant of healthcare benefits to employee Sean Feigley during the critical period constituted objectionable conduct. See, e.g., *Mailing Services*, 293 NLRB 565 (1989) (free medical screenings during critical period objectionable); *Wagner Electric Corp.*, 167 NLRB 532 (1967) (free life insurance during critical period objectionable).

Member Schiffer agrees that the Petitioner's conduct is objectionable based on the hearing officer's findings, including credibility determinations, that Feigley was not entitled to benefits under the Petitioner's healthcare benefits plan, that there was no past practice of granting employees of non-signatory employers healthcare benefits, and that the Employer continued to provide healthcare benefits after the expiration of the Sec. 8(f) agreement. She does not endorse the hearing officer's interpretation of *Turnberry Isle Country Club*, 253 NLRB 416 (1980).

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Jayson Weir. The Regional Director shall then prepare and cause to be served on the parties a revised tally of ballots.

IT IS FURTHER DIRECTED that if the revised tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall issue a certification of results. If, however, the revised tally shows that the Petitioner has received a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

Dated, Washington, D.C., July 1, 2014

Philip A. Miscimarra,	Member
Harry I. Johnson, III,	Member
Nancy Schiffer,	Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD